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Mountain States Legal Foundation v. Utah Public Service Commission et al : Reply Brief of the Appellant

Utah Supreme Court

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Robert B. Hansen; Attorney for Respondents;

IN THE SUPREME COURT OF THE
STATE OF UTAH

MOUNTAIN STATES LEGAL FOUNDATION, Appellant, v. UTAH PUBLIC SERVICE COMMISSION; MILLY BERNARD, OLOF ZUNDEL, and KENNETH RIGTRUP, as Commissioners thereof, Respondents.	)	No. 16162

REPLY BRIEF OF THE APPELLANT, MOUNTAIN STATES LEGAL FOUNDATION

Review, by Writ of Certiorari, of a Decision on Rehearing of the Utah Public Service Commission

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I. THIS COURT HAS THE AUTHORITY, AND THE OBLIGATION, TO REVIEW THE ACTIONS OF THE UTAH PUBLIC SERVICE COMMISSION TO DETERMINE WHETHER IT IS ACTING WITHIN THE STATUTORY LIMITS OF ITS AUTHORITY.

The Utah Public Service Commission (Commission) is a creature of statute. Its authority originates from and is bounded by those statutes under which it was created, Utah Code Annotated § 54-1-1 et seq. (1953). See e.g. Basin Flying Service v. Public Service Commission, ____ Utah 2d ___, 531 P.2d 1303, 1305 (1975); Lakeshore Motor Coach Lines, Inc. v. Welling, 9 Utah 2d 114, 339 P.2d 1011, 1013 (1959).

The statutes creating the Commission, specifically Utah Code Annotated section 54-7-16, provide for judicial review of the Commission's actions. Section 54-7-16 directs the Court to determine "whether the Commission has regularly pursued its authority . . . ." This judicial review is an important part of the checks and balances function of our system of government. It protects the public from the unlawful exercise of authority by an appointed, non-elected administrative body.

In order to fulfill its statutorally mandated obligation, the Court cannot restrict its review of Commission actions, as the respondents have implied it should, to the question simply of whether the Commission has acted on the basis of sufficient evidence, see Brief of Respondents at 2-4. The Court must consider whether the Commission should have acted at all. It is the appellant's argument that the Commission acted beyond its authority in the present case. Therefore, this case involves primarily a legal question, reviewable under the statutes, and not a factual

question reviewable only on the basis of a "substantial evidence" standard. The question is not whether, factually, senior citizens are being given a more favorable rate than other residential customers; that fact has been admitted by the parties and the Commission. The main issue is whether such favorable treatment constitutes a "preference" prohibited by Utah Code Annotated section 54-3-8 (1953) and whether the Commission has therefore acted beyond its authority in providing for such favorable treatment. As the appellant already pointed out in the Opening Brief of the Appellant, Mountain States Legal Foundation (Opening Brief) at 9-10, since this case presents a question of law, the Court's review powers are not governed by the provisions of sections 54-7-16 and 54-3-8 of the Utah Code Annotated which limit the Court's power to review the Commission's factual findings.

The issue of the scope of judicial review of commission decisions relating to preference and discrimination was raised in an almost identical case, Mountain States Legal Foundation v. Public Utilities Commission, ____ Colo. ____, 590 P.2d 495 (1979) [see Opening Brief, Appendix A]. In that case, the Colorado Supreme Court did not feel constrained by similar Colorado judicial review statutes and proceeded to rule on the questions presented as matters of law, see Colo. Rev. Stat. §§ 40-6-115, 40-3-106(1) (1973).

II. ELDERLY RESIDENTIAL UTILITY CUSTOMERS DO NOT CONSTITUTE A CLASS OF SERVICE.

For the purpose of determining which of the two standards set forth in section 54-3-8 of the Utah Code Annotated is applicable in this case, the important question is whether elderly residential

customers of Utah Power & Light Company (UP&L), as a group, constitute a class of service.[1] The mere fact that such customers may be grouped together by a common characteristic, specifically, age, and therefore be considered a "class" for some purposes, does not make them a "class of service" for the purposes of section 54-3-8.

The appellant's Opening Brief, at 13-15, contains a full discussion of why elderly residential customers do not constitute a class of service. To summarize, it would be a perversion of the term "class of service," as it is used in section 54-3-8, to determine that it encompasses utility customers grouped on the basis of characteristics which have nothing to do with the utility service provided. A class of service, or a subdivision of a class of service, is based on usage and load characteristics associated with the service provided.

The respondents seek to liken the senior citizen group to the standard subclasses within the residential class of service. Prior to the implementation of the senior citizen rate, there existed, within UP&L's residential class of service, three subclasses, all differentiated on the basis of the service received; customers receiving regular residential service

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1. Utah Code Annotated § 54-3-8 (1953) provides:

> No public utility shall, as to rates, charges, service, facilities or in any other respect, make or grant any preference or advantage to any person, or subject any person to any prejudice or disadvantage. No public utility shall establish or maintain any unreasonable difference as to rates, charges, service or facilities, or in any other respect, either as between localities or as between classes of service.

(Schedule 1), customers receiving regular residential service plus water heating (Schedule 2), and customers receiving all electric residential service (Schedule 5).[2] Even the most summary evaluation of the senior citizen "subclass" demonstrates that it does not reflect a unique service, or unique usage and load characteristics, as do the standard subclasses. The grouping of elderly customers has resulted in the subdivision of the residential class into three additional subclasses, which parallel, in terms of service received, the existing subclasses; namely, senior citizen customers receiving regular residential service (Schedule 32A), senior citizens receiving regular residential service plus water heating (Schedule 32B), and those senior citizens receiving all electric service (Schedule 32C). The only distinction between residential customers being served under schedules 1, 2 and 5 and residential customers being served under schedules 32A, 32B and 32C is their age and not the service being received. Clearly, elderly residential customers do not constitute a class of service.[3] Because they do not constitute a class of service, rates applicable to them are governed by that provision of section

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2. The tariff sheets reflecting existing residential and senior citizen rate schedules have been filed with the Court as part of the supplemental record.

3. An examination of the record in this case reveals that the senior citizen "subclass" was created on the basis of age and income characteristics. It was not created because of differences in usage and load characteristics. Data introduced to show that elderly customers consume slightly less than average amounts of energy (due to the fact that households headed by senior citizens are smaller) was not the justification for the classification. Moreover, such data was never alleged to demonstrate any usage and load characteristics which justified the subclass on traditional grounds. In fact, witness Al Dunn denied that any differences in usage and load factors existed between the two groups of customers. See Opening Brief at 13-15.

54-3-8 which prohibits the granting of a preferential rate to any person.

Respondents appear to argue that the 1977 amendment to Utah Code Annotated section 54-3-1 (1953)[4] cures the fact that the elderly customers, as a group, do not constitute a class of service and exempts them from the application of the section 54-3-8 prohibition against preferences in rates. They justify this conclusion stating: "The legislature cannot be said to have done a useless thing in the 1977, amendment," Brief of Respondents at 7. Apparently, the intended inference is that either the amendment must be read to allow the Commission to create ratemaking classes on any basis it chooses and thereby permit preferential rates, or the amendment has no meaning.

It is important to understand what the amendment to section

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4. Utah Code Annotated § 54-3-1 (1953) states:

All charges made, demanded or received by any public utility . . . for any service rendered or to be rendered, shall be just and reasonable. Every unjust and unreasonable charge made, demanded or received for such . . . service is hereby prohibited and declared unlawful. Every public utility shall furnish, provide and maintain such service, instrumentalities, equipment and facilities as will promote the safety, health, comfort and convenience of its patrons, employees and public, and as will be in all respects adequate, efficient, just and reasonable. All rules and regulations made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable. The scope of definition "just and reasonable" may include, but shall not be limited to, the cost of providing service to each category of customer, economic impact of charges on each category of customer, and on the well being of the State of Utah; methods of reducing wide periodic variations in demand of such products, commodities or services, and means of encouraging conservation of resources and energy. [Amended material indicated by underscoring].

54-3-1 does and does not do. It does not transform a group of customers which does not constitute a class of service into a class of service for purposes of section 54-3-8. Section 54-3-1, as amended, does not empower the Commission to create classes of service on non-service related bases and it does not authorize the Commission to permit preferences as to rates between customers receiving the same service. It does not obviate the limitations which section 54-3-8 places on the Commission's authority. What the amendment does do, is to permit the Commission to consider the economic impact of utility charges on customers when such considerations may be acted upon without violating section 54-3-8.

At the time that the legislature amended section 54-3-1, it did not amend section 54-3-8 to permit utilities to grant preferences and impose disadvantages as to rates. Moreover, the amending of section 54-3-1 did not repeal section 54-3-8 by implication. Repeal by implication, which is not favored, was discussed by the Utah Supreme Court at length in Union Pacific Ry. v. Public Service Commission, 103 Utah 186, 134 P.2d 469 (1943). The court stated:

> It is elementary that statutes may be repealed by implication, and where the provisions of a later statute are clearly and manifestly repugnant to the provisions of existing statutes the latter are deemed repealed to the extend of such repugnancy. Such repeals, however, are not favored, and if two apparently conflicting acts can be reasonably construed so as to reconcile and give effect to each, such construction should be adopted. Whether there has been a repeal by implication is primarily a question of legislative intent, and it cannot be adjudged that there has been a repeal unless the legislative intent clearly appears. People v. McAllister, 10 Utah 357, 37 P. 578; State v. Carmen, 44 Utah 353, 140 P. 670; University of Utah v. Richards, 20 Utah 457, 50 P. 96, 77 Am. St. Rep. 928; 59 C.J. 904 et seq. Id. at 474. See also Bowling Club v. Toronto, 17 Utah 2d 5, 403 P.2d 651 (1965).

Applying the Union Pacific tests to the present case, it is first obvious that there is no necessary inconsistency between section 54-3-1 and 54-3-8, since the former deals with the reasonableness of rate levels (charges) and the latter deals with discrimination between rates charged various customers, see Opening Brief at 27-29. Consequently, it is difficult to state that the amendment to section 54-3-1 is "clearly and manifestly repugnant" to section 54-3-8. Moreover, the amendment does not reflect a "clear legislative intent" to permit the Commission to create, without restriction, preferences and discriminations between utility customers. In fact, legislative intent would appear to dictate the opposite conclusion. The legislature ordered the Public Service Commission to conduct generic hearings to consider whether or not minimum cost rate structures (presumably similar to the special rate for the elderly), should be implemented, and to report its conclusions to the legislature, which strongly indicates that the legislature did not ever intend to delegate to the Commission the power to implement such a rate absent legislative concurrence. H.C.R. No. 1, 1977 Utah Laws at 1297, see Opening Brief at 2.

The conclusion that the amendment to section 54-3-1 does not permit the Commission to establish preferential rates for certain customers, does not render it useless or meaningless. Sections 54-3-1 and 54-3-8, as written, can be read harmoniously without injury to the essential meaning of either. There are numerous situations in which the Commission can consider economic impact on customers without violating section 54-3-8. As Mr. Maurice Brubaker, a witness in the proceeding being appealed, recognized, the

Commission may consider economic impacts on various customers and act on those considerations in ways other than by creating preferences between customers. For example, if the Commission discovers that existing rates being charged to certain classes of service or subclasses of service are well below the cost of that service, economic impact considerations would prevent the Commission from adjusting those rates to reflect costs through an immediate and sizeable increase in rates. Instead the authority of the Commission to consider economic impacts would permit it to raise such rates on an incremental basis. (R. 407-408)

Mr. Brubaker also suggested that if a utility has had an extraordinary loss during a particular year, the Commission might want to consider economic impact on customers in determining whether the loss should be born by the stockholders of the utility or the ratepayer and whether it was to be made up immediately or amortized over a period of years (R. 408). He suggested that in considering the implementation of "time of use" rates the Commission might want to consider the economic impact on the customer of installing metering equipment versus the benefits to the customers to be derived from such metering (R. 408). Finally, he suggested that economic impacts on customers might be considered in determining whether rates at a certain level might cause certain customers or certain classes of service to switch to alternate sources of energy or to produce their own, thereby leaving the utility system and causing rates to increase for all remaining customers (R. 408).

All of these considerations have been and can be made by the Commission without offending the limitations of section 54-3-8. However, for the Commission to establish a special low rate for certain customers and shift the burden of subsidizing that low rate to other customers, in violation of section 54-3-8, is beyond any authority conferred by section 54-3-1.

III. FAVORABLE TREATMENT OF THE ELDERLY IN OTHER CIRCUMSTANCES IS NOT RELEVANT TO THE PRESENT CASE.

The fact that entities other than the Commission may grant special preferences to the elderly is irrelevant to the question of whether the Commission has the authority to do so. It must not be overlooked that the special rate for the elderly is not being financed by the Commission or by the utility company but is being financed through an additional charge collected from all non-elderly residential customers (and large-volume elderly customers) through their utility rates. A private person or company might properly, in some circumstances, make a gift of money, goods or services to senior citizens. The elected representatives of the citizens of the State of Utah, might properly, in some circumstances, decide that the public interest required the use of general tax revenues to support programs directed toward benefitting the elderly. Neither of these facts support the actions of a non-elected, appointed administrative agency in deciding that funds should be collected from some utility customers, on the basis of how much energy they use, in order to benefit another group of customers, selected, on some "policy" basis, by the Commission.

CONCLUSION

For the reasons set forth above and in the appellant's Opening Brief, it is clear that the Commission lacks the authority to use the utility rate structure to "tax" one group of utility customers for the benefit of another. The special rate for the elderly is, by definition, preferential in violation of Utah Code Annotated section 54-3-8 (1953). Even if the Commission has acted within its statutory authority, for reasons set forth in the Opening Brief, its acts have violated the constitutional rights of the appellant's members. Therefore, Mountain States Legal Foundation respectfully requests the Court to set aside the Commission's Order of November 1, 1978.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have placed a true and correct copy of the foregoing Reply Brief of Appellant, Mountain States Legal Foundation in the United States mail, postage prepaid and properly addressed to each of the following parties, this 5th day June, 1979.

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